

1 LAURA E. DUFFY  
United States Attorney  
2 RICHARD TOLLES  
Assistant U.S. Attorney  
3 State of California Bar No. 078948  
Office of the U.S. Attorney  
4 880 Front Street, Room 6293  
San Diego, CA 92101-8893  
5 Telephone: (619) 557-7479

6 Attorneys for Defendant  
United States of America  
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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10 ELSA MANULID, ) Case No. 10CV0721WQH (CAB)  
11 )  
Plaintiff, ) MEMORANDUM OF POINTS AND  
12 )  
v. ) AUTHORITIES IN SUPPORT OF  
13 ) MOTION TO DISMISS COMPLAINT  
SYCUAN CASINO & RESORT, an entity) DATE: October 18, 2010  
14 SYCUAN BAND OF THE KUMEYAAY NATION, ) TIME: 11:00 a.m.  
an entity; DR. DONALD WEISS, an ) CTRM: 4  
15 individual, and DOES 1-30, )  
inclusive, )  
16 )  
Defendants. )  
17 )  
18 )

NO ORAL ARGUMENT UNLESS  
REQUESTED BY THE COURT

19 I

20 BACKGROUND AND PROCEDURAL HISTORY

21 On April 6, 2010, Plaintiff initiated this action naming as  
22 Defendants, inter alia, the Sycuan Band of the Kumeyaay Nation and  
23 Donald Weiss, M.D. Dr. Weiss is a physician-employee of the Sycuan  
24 Tribal Government and provides medical services at the Sycuan Medical  
25 Clinic. Dr. Weiss' position is funded under the Indian Self  
26 Determination and Education Assistance Act (ISDEAA), 25 U.S.C.  
27 § 450f(d).

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1 Plaintiff's Complaint alleges various employment-related claims  
2 against the Sycuan tribal Defendants, and a common law battery claim  
3 against Dr. Weiss. It is clear from the Complaint that the alleged  
4 battery occurred while Dr. Weiss was providing medical services to  
5 Plaintiff at the Sycuan Medical Clinic. Complaint, ¶¶ 12, 42-47.

6 With respect to the particular events alleged in the Complaint,  
7 the United States Attorney for the Southern District of California,  
8 through her designate, has certified pursuant to 42 U.S.C. § 233(c)  
9 and 28 U.S.C. § 2679(d)(1) that Dr. Weiss was acting within the scope  
10 of his employment at the Sycuan Medical Clinic, under an ISDEAA  
11 funding agreement. A copy of the certification was filed with the  
12 Court on or about September 9, 2010. Because Dr. Weiss was providing  
13 medical services pursuant to an ISDEAA agreement, he is deemed an  
14 employee of the Department of Health and Human Services, Public Health  
15 Service, for purposes of suit for acts or omissions in the provision  
16 of such services. See 25 U.S.C. § 450f(d).

17 Following the certification of Dr. Weiss, the United States was  
18 substituted as the defendant in place of Dr. Gomez, as provided in 42  
19 U.S.C. § 233(c) (suit against a PHS employee to be "deemed a tort  
20 action brought against the United States") and 28 U.S.C. § 2679(d)(1)  
21 (mandating substitution as to federal employees sued for acts within  
22 the scope of federal employment). The medical claim alleged against  
23 Dr. Weiss now proceeds as a tort action against the United States  
24 under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671, et seq.  
25 See 42 U.S.C. § 233(a).

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1 Before commencing an FTCA suit, a claimant must pursue  
 2 administrative remedies by presenting an administrative claim within  
 3 two years after a claim accrues. See 28 U.S.C. §§ 2401(b), 2675(a).  
 4 No record exists that Plaintiff submitted an FTCA administrative claim  
 5 as required by the FTCA. See Exhibit 1, Hawkins Decl., ¶¶ 1-4.  
 6 Plaintiff's claim therefore must be dismissed for lack of subject  
 7 matter jurisdiction under Fed. R. Civ. P. 12(b)(1).<sup>1/</sup>

## 8 II

### 9 ARGUMENT

#### 10 THE COURT LACKS SUBJECT MATTER JURISDICTION UNDER THE FTCA DUE TO 11 PLAINTIFF'S FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

12 The United States is immune from suit save as it consents to be  
 13 sued. United States v. Mitchell, 445 U.S. 535, 538 (1980);  
 14 United States v. Testan, 424 U.S. 392, 399 (1976). The FTCA is a  
 15 limited statutory waiver of the United States' sovereign immunity from  
 16 suit. "Any such waiver must be strictly construed in favor of the  
 17 United States." Ardestani v. Immigration and Naturalization Service,  
 18 502 U.S. 129, 137 (1991). Therefore, any prerequisites to the filing  
 19 of a suit under the FTCA must be strictly observed. A jurisdictional  
 20 prerequisite to suing the United States in tort is the filing of an  
 21 administrative claim with the appropriate federal agency, as required  
 22 by 28 U.S.C. § 2675(a). Brady v. United States, 211 F.3d 499, 502  
 23 (9th Cir. 2000); Cadwalder v. United States, 45 F.3d 297, 300 (9th  
 24 Cir. 1995). As set forth in 28 U.S.C. § 2675(a):

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27 <sup>1/</sup> The FTCA contains a savings provision for actions in which the  
 28 United States is substituted in place of an individual defendant.  
 Section 2679(d)(5) of 28 U.S.C. provides sixty days from dismissal to  
 present the required administrative claim.

1 (a) An action shall not be instituted upon a claim against  
 2 the United States for money damages for injury or loss of  
 3 property or personal injury or death caused by the  
 4 negligent or wrongful act or omission of any employee of  
 5 the Government . . . unless the claimant shall have first  
 6 presented the claim to the appropriate Federal agency and  
 7 his claim shall have been finally denied by the agency in  
 8 writing. . . . The failure of an agency to make final  
 9 disposition of a claim within six months after it is filed  
 10 shall. . . be deemed a final denial of the claim for  
 11 purposes of this section.<sup>2/</sup>

12 Plaintiff's FTCA claim must be dismissed because she has not pled  
 13 that she complied with the FTCA's administrative exhaustion  
 14 requirement before bringing this action, and because the evidence  
 15 before the Court proves that she filed no such claim.

16 A plaintiff has the burden to allege that subject matter  
 17 jurisdiction is proper. Kokkonen v. Guardian Life Ins. Co., 511 U.S.  
 18 375, 377 (1994). At the pleading stage, this burden is met by  
 19 pleading sufficient allegations to show a proper basis for the court  
 20 to assert subject matter jurisdiction. McNutt v. Gen. Motors  
 21 Acceptance Corp., 298 U.S. 178, 189 (1936); Fed. R. Civ. P. 8(a)(1).

22 A plaintiff suing in federal court must show in his  
 23 pleading, affirmatively and distinctly, the existence of  
 24 whatever is essential to federal jurisdiction, and, if he  
 25 does not do so, the court, on having the defect called to  
 26 its attention ... must dismiss the case, unless the defect  
 27 can be corrected....

28 Tosco Corp. v. Cmtys for a Better Env't., 236 F.3d 495, 499 (9th Cir.  
 2001), abrogated on other grounds by Hertz Corp. v. Friend, 130 S. Ct.

<sup>2/</sup> Once an FTCA claim is presented, the involved federal agency  
 has six months to act. See 28 U.S.C. § 2675(a). A lawsuit which is  
 commenced prior to the presentation of an FTCA administrative claim  
 to the appropriate agency is premature and must be dismissed. Jerves  
v. United States, 966 F.2d 517, 519 (9th Cir. 1992). A premature  
 complaint cannot be cured by presenting an FTCA administrative claim  
 to the agency after suit has been filed. McNeil v. United States, 508  
 U.S. 106, 110-13 (1993). Rather, a premature suit must be dismissed  
 and refiled after the presentation of an administrative claim and  
 either its subsequent denial, or alternatively, the expiration of the  
 six-month statutory period afforded by 28 U.S.C. § 2675(a).

1 1181 (2010). Plaintiff's complaint contains no allegation concerning  
 2 the presentation of an FTCA administrative claim. Accordingly, she  
 3 fails to allege an important prerequisite to subject matter  
 4 jurisdiction and dismissal is required.

5 As discussed in the Declaration of Daretia Hawkins, an attorney  
 6 at the Office of the General Counsel, Department of Health and Human  
 7 Services (HHS), any claim presented by Plaintiff to HHS directly, or  
 8 to the Sycuan Medical Clinic, would have been entered into the HHS  
 9 Claims Office computerized database. Ex. 1 at ¶ 3. However, no  
 10 record of any administrative tort claim from Plaintiff has been  
 11 located in the computerized database maintained by HHS. Id. at ¶ 4.  
 12 Furthermore, Ms. Hawkins' staff contacted the Sycuan Medical Clinic  
 13 and was advised that they had no record of any FTCA administrative  
 14 claim presented by Plaintiff.<sup>3/</sup> Id.

15 This Court may consider evidence outside the complaint in  
 16 connection with a challenge to its subject matter jurisdiction. See  
 17 Gotha v. United States, 115 F.3d 176, 179 (3rd Cir. 1997). When such  
 18 evidence is presented, "[n]o presumptive truthfulness attaches to  
 19 plaintiff's allegations, and the existence of disputed material facts  
 20 will not preclude the trial court from evaluating for itself the  
 21 merits of jurisdictional claims.'" Augustine v. United States, 704  
 22 F.2d 1074, 1077 (9th Cir. 1983) (citation omitted). Because Plaintiff  
 23 failed to present an administrative claim before commencing this suit,  
 24 the action is premature and must be dismissed for lack of subject  
 25 matter jurisdiction.

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 28 <sup>3/</sup> As held in Estrella v. United States, 2000 WL 33348249, \*3  
 (W.D. Tex.), delivery of a claim to a health center, such as the  
 Sycuan Medical Clinic is legally insufficient in any event.

III

CONCLUSION

Plaintiff has not complied with the administrative claim requirements of the FTCA. She therefore has failed to satisfy the FTCA's jurisdictional prerequisites and Plaintiff's claim against the United States must be dismissed.

DATED: September 9, 2010

LAURA E. DUFFY  
United States Attorney

s/ Richard Tolles

RICHARD TOLLES  
Assistant U.S. Attorney  
E-Mail: Richard.Tolles@usdoj.gov  
Attorneys for Defendant  
United States of America